84-293 (1)

No. .....

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS.
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

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JOHN FERNEDING,

Appellant,

v.

CONSOLIDATED RAIL CORPORATION, ET AL.,

Appellee.

---

**On Appeal From The Supreme Court of Ohio**

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## STATEMENT OF JURISDICTION

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25PP

## QUESTIONS PRESENTED

1. Whether Or Not Grant of Defendant's Motion For Summary Judgment In A FELA Action Absent Express Reliance Upon Adequate and Independent State Grounds In The Judgment Provides Sufficient Federal Questions To Establish Jurisdiction of This Court For Purpose Of Appeal.

2. Whether Or Not State Courts' Grant Of Summary Judgment In A FELA Action, Resulting From Evaluation Of Evidence By A Lesser Standard Than That Required By Federal Courts In Similar Actions Deprived Appellant Of His Right To Have The Federal Right Determined By Federal Law In State Court According To The Supremacy Clause Found In Article VI Of The Constitution Of The United States.

Please note: Appellant's action against named co-defendant William Tarvin, is still pending in the Court of Common Pleas, Hamilton County, Ohio, Case No. A8110286

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

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No. .....

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JOHN FERNEDING,

Appellant,

v.

CONSOLIDATED RAIL CORPORATION, ET AL.,

Appellee.

---

**On Appeal From The Supreme Court of Ohio**

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## JURISDICTIONAL STATEMENT – STATE CIVIL CASE

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## PETITION

Appellant John W. Ferneding respectfully appeals to this Court for review of the judgment and decision of the Supreme Court of Ohio denying Appellant's Motion to Certify the Record of the First District Court of Appeals, and for removal of this matter to the trial court for further proceedings.

## OPINIONS BELOW

The judgment of the Court of Appeals for the First Appellate District of Ohio, rendered November 23, 1983, is unreported and appears as Appendix A to this document (post. at p. 1a.) The decision of the Ohio Supreme Court refusing review of this case in its denial of Appellant's Mo-

tion to Certify entered March 21, 1984, is appended hereunto as Appendix B.

## JURISDICTIONAL GROUNDS IN THIS COURT

The final order and appealable order of the Supreme Court of Ohio denying review of this matter was rendered March 21, 1984.

The jurisdiction of this Court to review this decision on appeal is conferred by 28 U.S.C. § 1257 (2). As the only remedy available to Appellant was to initiate action in tort under the provisions of 45 U.S.C. § 51, the existence of questions of federal import has been facially present at all times to each court which has reviewed this matter; the fact that a federal question has not been formally raised in previous pleadings has not been held to be fatal to a timely appeal arising out of the underlying federal question. The following decisions sustain the jurisdiction of the Supreme Court to review this matter at this juncture: *Martinez* v. *California,* 444 U.S. 277 (1979); *Zacchini* v. *Scripps Howard Broadcasting Company,* 433 U.S. 562 (1977); *Cooper* v. *Mitchell Brothers Santa Ana Theatres,* 454 U.S. 90, (1981), reh'g denied, 103 S. Ct. 259.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

ARTICLE 6, U.S. CONSTITUTION,
(Supremacy Clause)

FEDERAL RULES OF CIVIL PROCEDURE
RULE 56 SUMMARY JUDGMENT

> (c) The judgment sought shall be rendered forthwith if . . . there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

OHIO RULES OF CIVIL PROCEDURE
RULE 56: SUMMARY JUDGMENT

> (c) . . . a summary judgment shall not be rendered unless it appears . . . that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the Motion for Summary Judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor.

## STATEMENT OF THE CASE

This appeal arises from an Order of the Court of Common Pleas, Hamilton County, Ohio which on January 5, 1983, granted Appellee Consolidated Rail Corporation (Conrail) a Motion for Summary Judgment, finding that the egregious acts of co-defendant William Tarvin, a Conrail employee and the Appellant's foreman, toward the Appellant could only be considered by reasonable men to have been outside the course of his employment. This decision was timely appealed, and was affirmed by the First Appellate District Court of Appeals on November 23, 1983. Notice of appeal to the Supreme Court of Ohio was timely filed on December 21, 1983; the Supreme Court denied Appellant's Motion to Certify in an Order dated March 21, 1984. At all times and before all courts the gravamen of this action was a claim under 45 USC § 51.

On February 26, 1981, Appellant John Ferneding was employed by Consolidated Rail Corporation (Conrail) and was under the supervision of William Tarvin, co-defendant of this action. Midway through his 3:30 p.m. to 11:30 p.m. shift, at approximately 8:00 p.m., Ferneding who had apparently been having difficulty in performing

his duties, received a telephone call from Tarvin directing him to perform specific work tasks.

Shortly thereafter, Tarvin a salaried employee who was on call 24 hours a day, presented himself at the signal shop where Ferneding was stationed. Tarvin was operating on specific instruction from his supervisor Al Hendershot, to check upon Appellant. Tarvin had admittedly been drinking that evening as was his custom; it was apparently common practice among the yard supervisors. In fact, one of the "problems" discussed with Appellant during the incident was his reporting of an on the job drinking incident to the railroad police two night earlier, when Hendershot, Tarvin's supervisor, had been called in to "investigate" Ferneding's allegation.

Tarvin put the gun which he customarily carried during the course of his employment to Ferneding's temple. For approximately the next four hours, Tarvin, keeping Ferneding's attention by periodically directing the loaded weapon to Ferneding's head, would discourse on Appellant's job performance and upon his shortcomings as an employee. Tarvin testified that the "purpose" of the incident was to "straighten things out" with Ferneding, as he had been instructed to do by the yard supervisor, Al Hendershot.

At no time during the ordeal did Tarvin discuss anything other than matters connected with their mutual employment. Tarvin testified that he had been assigned the "dirty work" of getting Ferneding "straightened out". Tarvin's actions were as a result of his "company's displeasure", rather than his own displeasure with Ferneding.

In response to counsel's question as to whether or not Tarvin felt that the incident was related to Tarvin's employment, Tarvin stated: "Yes sir. I mean I had no per-

sonal problems with that man". (Plaintiff's Deposition 7-22-1982, p. 107).

As a result of the trauma of the incident, Appellant Ferneding suffered and is still suffering emotional and financial damages which can now only be appropriately redressed by action of this court.

## REASONS WHY ISSUES HEREIN ARE SUBSTANTIAL

### I. FEDERAL QUESTION JURISDICTION CAN BE PRESUMED FROM APPARENT RELIANCE UPON THE FEDERAL QUESTION BY THE STATE COURT.

In almost every instance in which a federal question used to establish jurisdiction in the Supreme Court has not been expressly relied upon by the state court in their review of the matter, it is the Appellant's responsibility to establish jurisdiction to the satisfaction of this Court. The federal question raised by this appeal is the application of the correct standard of review of the evidence by the trial court in its grant of summary judgment for Defendant-Appellee Conrail. *Wilkerson* v. *McCarthy,* 336 U.S. 53 (1949). Although the Ohio trial court did not formally express its consideration of federal law in its decision, still the federal question which here establishes jurisdiction exists.

This Court has never required a state court decision to be cast solely in terms of the federal question in order to preserve an issue for appeal. *Martinez* v. *California,* 444 U.S. 277 (1979); *Zacchini* v. *Scripps Howard Broadcasting Company,* 433 U.S. 562, (1977). Where only one issue of fact and law are presented on appeal, jurisdiction

has been necessarily found. *Cooper* v. *Mitchell Brothers Santa Ana Theatre*, 454 U.S. 90, (1981), reh'g denied, 103 S. Ct. 259. Presented here is just such a single issue case. Because the law that governs is the Federal Employer's Liability Act (hereafter "FELA") 45 U.S.C. 51 et seq. jurisdiction in this Court is established as a matter of right, where as here, the decision by the state supreme court involves a single federal issue.

Recently this Court has ruled that there is a presumption in favor of jurisdiction in cases where it is facially apparent from the judgment that a state court relied upon a federal question in its judgment. *Michigan* v. *Long*, — U.S. —, 103 S. Ct. 3469, 77 L.Ed.2d 120 (1983). In that case Justice Sandra Day O'Connor, writing for the Court, ruled that jurisdiction will be assumed in such cases unless the state court "plainly stated" its intention to rely upon adequate and independent state grounds. Thus, no longer is this Court required to second guess the intentions of the state court based upon a judgment that does not direct itself specifically to the federal issue.

Clearly the rationale supporting the holding, if not the rule, of *Michigan* v. *Long*, 103 S. Ct. 3469, 77 L.Ed.2d 120 (1983), deserves retrospective application to the facts presented here. Its purpose, improved economy and efficiency of judicial administration, is needed in this case, as in others. *Hopt* v. *Utah*, 110 U.S. 574 (1884). Based upon *Michigan*, jurisdiction here is apparent as a result of the state court's reliance upon some, albeit unarticulated, standard of review of the evidence in granting summary judgment. If this Court however, chooses to avoid retrospective application of *Michigan* v. *Long*, 103 S. Ct. 3469, 77 L.Ed.2d 120 (1983), then nonetheless it should find jurisdiction in this case as no state ground is apparent

as the basis for the decision, much less an adequate and independent one. Under the traditional rule, it has been held that in actions brought under 45 U.S.C. § 51, sufficiency of evidence considered by state courts is a formally reviewable question. *Shellhammer* v. *Lehigh Val. R. Co.*, (N.J. 1954), 102 A.2d 602, 14 N.J. 341, cert. denied, 347 U.S. 990, reh'g denied, 348 U.S. 852.

Specifically, federal decisions are clearly to be considered to govern questions of sufficiency of evidence, type of proof necessary for judgment, and issues of proof brought under FELA. *Overstreet* v. *Atlantic Coastline R. Co.*, (Fla. App. 1963), 152 So.2d 188, 96 A.L.R.2d 649. It is the failure of the state court here to apply the correct standard of proof in its grant of summary judgment which further justifies consideration of this court, as is further discussed below.

## II. THE TRIAL COURT AND APPELLATE COURTS AT THE STATE LEVEL ERRED IN THEIR APPLICATION OF THE WRONG STANDARD OF EVIDENTIARY REVIEW IN GRANTING AND AFFIRMING SUMMARY JUDGMENT.

Appellant complained of duty, breach of duty, and causation to claim damage jointly and severally from Defendant-Appellees in this action. Appellant testified at deposition that Appellee's supervisor, Tarvin, assaulted him with a gun and intimidated him with verbal abuse during a four hour imprisonment in the railroad yard. Appellant testified further that the resulting shock has caused him to lose sleep and to be unable to work. Appellant's claim against the Appellee is based upon these ultimate

facts, and the direct attributions of responsibility to the Appellee by Appellant's testimony that the tortfeasor customarily carried a gun in scope of his employment and routinely and verbally intimidated and harrassed his subordinates.

The error of the state court's grant and affirmation of summary judgment in this action was two-fold. First, the dismissal of the Appellant's case on the theory that the tortfeasor acted without the scope of his employment was based on an erroneous interpretation of the FELA cause of action. Furthermore, it was improper to weigh the credibility of Appellant's circumstantial proof against him on the motion for summary judgment. *Wilkerson* v. *McCarthy*, 336 U.S. 53 (1949).

Under the decisions of this Court, a jury verdict against the employer under FELA is sustained, and ipso facto, the pleading stating the cause of action is upheld, by a showing of circumstances tending to prove that the employer negligently caused the injuries suffered by a railroad employee. *Rogers* v. *Missouri-Pacific R.R. Co.*, 352 U.S. 500 (1957). As stated by this Court:

> . . . for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference. *Rogers* v. *Missouri-Pacific Railway Co.*, 352 U.S. 500 at 508 (1957).

Appellant certainly showed sufficient circumstantial evidence against the Appellee that with undisputed testi-

mony that Tarvin customarily carried a gun on the job and routinely harrassed and drank on the job with the acquiescence of his supervisors. *Harrison* v. *Missouri-Pacific Railroad Co.*, 372 U.S. 248 (1963). It was improper for the state courts to consider any other issue than the proof of the Appellee's negligence, under the law.

In Appellant's deposition, there was clear proof of Appellee's negligence in retaining a vicious and ill-tempered employee to remain in its employment. Appellant's cause of action is supported by precedent from this Court allowing a damages recovery under the FELA for the employer's negilgent failure to prevent an assault by a co-employee. *Harrison* v. *Missouri-Pacific Railroad Co.*, 372 U.S. 248 (1963). As this Court stated in that case:

> That the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nevertheless had a duty to make reasonable provision against it. *Id.* at 249.

There are numerous precedents holding that an employer may be responsible under the FELA for the negligent hiring or retention of a vicious and dangerous employee who assaults another employee. *Harrison* v. *Missouri R.R. Co.*, 372 U.S. 248 (1963); *Atlantic Coastline R.R. Co.* v. *Southwell*, 275 U.S. 64 (1947); *Najera* v. *Southern Pacific Railway Co.*, 13 Cal. Rptr. 146, 191 Cal. App.2d 634 (1961); *Tatham* v. *Wabash Railway*, 412 Ill. 606, 107 N.E.2d 735 (1952). Causes of action have also been recognized for injuries arising from the accidental discharge of a gun belonging to another employee. *Baker* v. *B & O Railway Co.*, 502 F.2d 638 (6th Cir. 1974). and even for foreseeable danger from the criminal acts of third persons, *Lillie* v. *Thompson*, 332 U.S. 459, (1947). That the evidence against the Appellee here-

in, Conrail, is circumstantial makes no difference to the Appellant's cause of action according to the precedent cited herein. The Appellant's case is reinforced by the presumption that the FELA employer knows of events customarily occurring at the place of business. *Miller* v. *Cincinnati Railway*, 317 F.2d 693 (6th Cir. 1963).

It was therefore clear in both the trial and appellate courts that Appellant had established a cause of action against the Appellee based upon circumstantial evidence. Once the Plaintiff-Appellant had established his cause of action by this much evidence in a FELA action, the trial court committed reversible error by dismissing the action without a jury trial since the credibility of Plaintiff-Appellant's evidence may not be weighed against him before trial. *Wilkerson* v. *McCarthy*, 336 U.S. 53 (1949). The numerous cases reversed on this same point by this Court establish the truth of this proposition beyond all doubt. Reversal is required in this case. *See*, *Wilkerson* v. *McCarthy*, 336 U.S. 53 (1949); *Lillie* v. *Thompson*, 332 U.S. 459, (1947); *Cogswell* v. *Chicago & Erie R.R. Co.*, 328 U.S. 820 (1946); *Tennant* v. *Peoria & P.U.R. Co.*, 321 U.S. 29 (1944).

This policy in favor of allowing the FELA Plaintiff to get to the jury with the bare minimum of probative evidence should not be lightly disturbed without good reason. *Rogers* v. *Missouri-Pacific R.R. Co.*, 352 U.S. 500 (1957). Certainly, there is every reason in this case to allow the Plaintiff-Appellant to get to the jury and nothing to warrant an exception to the general rule.

The Plaintiff-Appellant's right to a full day in court on summary judgment, which is treated with respect in FELA law, is at stake here. *Streeter* v. *Erie Railroad*, 25

F.R.D. 272 (S.D.N.Y. 1960). Although it was originally said in a different context, the following comment on the day in court could just as easily have been made in this FELA case:

> "[A] litigant should not be easily deprived of his day in court except upon a clear showing that he presents no admissable evidence which is worthy of consideration by a jury or other trier of fact." *Manok* v. *Southwest District Bowling Association,* 306 F.Supp. 1215 at 1219 (C.D. Cal. 1969).

In the interests of justice, this Court should correct the deprivation that Appellant suffered when he was, by a grant of summary judgment, denied and in effect deprived of his right to have the federal right determined by federal law in state court according to the Supremacy Clause of the U.S. Constitution. In the case of *Harrison* v. *Missouri-Pacific R.R. Co.,* 372 U.S. 248, (1963), Plaintiff-Appellant had the opportunity to depose the Appellee's agents. Only a reversal of the summary judgment will give Appellant his first full opportunity to discover Appellee's officers, directors and in particular, its managing agents at the affected railroad yard.

## CONCLUSION

Clearly Appellant produced sufficient evidence of negligence to support a jury verdict against the Appellee. Certainly it was sufficient to defeat a Motion for summary judgment.

In FELA actions, the credibility of the evidence produced by Plaintiff-Appellant, however slight its bearing on the case, may not be weighed against him on a motion to dismiss before trial.

The Court is respectfully urged to review this case, to reverse the judgment below, and to remand with instructions to provide Appellant an opportunity to complete discovery and to proceed with a trial on the merits of the case.

Respectfully submitted.

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ATTORNEYS FOR
APPELLANT

## APPENDIX "A"

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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

---

APPEAL NO. C-830038
TRIAL NO. A-8110286

---

JOHN FERNEDING,
Plaintiff-Appellant,

vs.

CONSOLIDATED RAIL CORPORATION,
Defendant-Appellee,

and

WILLIAM TARVIN,
Defendant.

---

**MEMORANDUM DECISION AND JUDGMENT ENTRY**

(Filed November 23, 1983)

Mr. Steven J. Chabot, 3014 Harrison Avenue, Cincinnati, Ohio 45211, for Plaintiff-Appellant,

Messrs. Dinsmore & Shohl, Carl J. Stich, Jr. of counsel, 2100 Fountain Square Plaza, 511 Walnut Street, Cincinnati, Ohio 45202, for Defendant-Appellee.

*PER CURIAM.*

This cause came on to be heard upon the accelerated calendar of this Court pursuant to App. R. 11.1 and Local Rule 12, and was submitted for decision upon the record from the Court of Common Pleas of Hamilton County, Ohio, and the briefs and arguments of counsel.

The instant appeal is taken from the order of the Court of Common Pleas granting a motion for summary judgment and dismissing a claim for damages against a railroad company that stemmed from an altercation between two of its employees. In the only assignment of error presented to us for review, the issue is whether the trial judge correctly concluded as a matter of law that the company was not liable for the actions of the offending employee under the doctrine of *respondeat superior* as it has been applied to an action brought pursuant to the Federal Employers' Liability Act, 45 U.S.C.A. § 51.

After reviewing the record, we are convinced that the evidence before the court below clearly demonstrated that the actions forming the basis of the claim against the railroad company were motivated by personal malice, that they were not committed in furtherance of the employer's business, and that they constituted in law an intentional tort falling outside the scope of the employment relationship. *See Davis* v. *Green* (1922), 260 U.S. 346, 43 S. Ct. 125; *Young* v. *New York Central Rd. Co.* (8th Dist. 1949), 88 Ohio App. 352, 88 N.E.2d 220. *See also Finley* v. *Schmitt,* No. C-810961, unreported (1st Dist. 1982). For this reason, we must conclude that the claim was properly resolved by summary judgment, and the assignment of error is, accordingly, without merit.

The judgment which this appeal is taken is hereby

affirmed, and it is, therefore, the Order of this Court that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court, being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by his counsel, excepts.

SHANNON, P.J., KEEFE and DOAN, JJ.

## APPENDIX "B"

THE SUPREME COURT OF OHIO

No. 84-98

THE STATE OF OHIO, ) 1984 TERM
)
City of Columbus. ) To wit: March 21, 1984

JOHN FERNEDING,
Appellant,

vs.

CONSOLIDATED RAIL CORP., et al.,
Appellees.

**MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR HAMILTON COUNTY TO CERTIFY ITS RECORD**

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by S. Chabot.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and seal of the Court this ..... day of ....., 19 .....

..... Clerk

## APPENDIX "C"

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IN THE SUPREME COURT OF
THE STATE OF OHIO
Case No. 84-98

---

JOHN FERNEDING,

Appellant,

vs.

CONSOLIDATED RAIL CORP., et al.,

Appellees.

---

**NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES**
(Filed June 19, 1984)

---

Notice is hereby given that John W. Ferneding the Appellant named above, hereby appeals to the Supreme Court of the United States from the final order of this Court, denying Appellant's Motion to certify, entered herein on March 21, 1984.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

Respectfully submitted,

/s/ HARVEY B. WOODS
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## CERTIFICATION

I certify that a true copy of the above was delivered by U.S. regular mail service to Carl J. Stich, Jr., Attorney for Defendant-Appellee, Consolidated Rail Corporation (Conrail) 2100 Fountain Square Plaza, 511 Walnut Street, Cincinnati, Ohio, and Dwight A. Pachard, Attorney for Defendant, William Tarvin, 930 Cin-Cols. Road, West Chester, Ohio, 45069, this 19th day of June, 1984.

/s/ HARVEY B. WOODS
Attorney for Petitioner

Office - Supreme Court, U.S.
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CLERK

84-293

No. A-1028

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1984

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JOHN FERNEDING,

Appellant,

v.

CONSOLIDATED RAIL CORPORATION,

Appellee.

---

On Appeal From The Supreme Court
For The State Of Ohio

---

## MOTION OF APPELLEE CONSOLIDATED RAIL CORPORATION TO DISMISS OR AFFIRM

---

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August 17, 1984

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IN THE

# SUPREME COURT OF THE UNITED STATES

**October Term, 1984**

No. A-1028

JOHN FERNEDING,

Appellant,

v.

CONSOLIDATED RAIL CORPORATION,

Appellee.

---

**On Appeal From The Supreme Court For The State Of Ohio**

---

## MOTION OF APPELLEE CONSOLIDATED RAIL CORPORATION TO DISMISS OR AFFIRM

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The appellee Consolidated Rail Corporation respectfully moves to dismiss the appeal herein, or in the alternative to affirm the judgments of the Supreme Court of Ohio, and the Court of Appeals of Ohio, pursuant to Sup. Ct. R. 16(1)(a), (b).

## STATEMENT OF THE CASE

### A. The Procedure and Opinions Below.

This action was filed under the Federal Employers' Liability Act, 45 U.S.C. §§ 51, et seq. Plaintiff alleges personal injury in the form psychological trauma resulting from an intentional tort committed by an off-duty Consolidated Rail Corporation ("Conrail") employee who threatened the plaintiff with a gun. The alleged tortfeasor, William Tarvin, is a named defendant, but is not a party to this appeal.

Conrail moved the trial court for summary judgment on the basis that Tarvin was acting outside the scope of his employment at the time of the assault. The record consisted of the deposition testimonies of Ferneding and Tarvin. Summary judgment was entered for Conrail. Plaintiff appealed to the Ohio Court of Appeals, which unanimously affirmed in a written opinion. Appendix A to Appellant's Statement of Jurisdiction. The court of appeals found the record conclusive that Tarvin's actions "were motivated by personal malice, that they were not committed in furtherence of the employer's business, and that they constituted in law an intentional tort falling outside the scope of the employment relationship." Slip. op. at 2; Appellant's Appendix at A-2. The court of appeals relied, in part, upon this Court's ruling in *Davis* v. *Green*, 260 U.S. 349, 43 S. Ct. 123 (1922).

Plaintiff moved the Ohio Supreme Court to exercise its discretionary jurisdiction to review the decision of the court of appeals. The motion was denied on March 24, 1984. Plaintiff thereafter docketed his appeal in this Court.

**B. The Issues Raised Below, and the Absence of a Substantial Federal Question.**

There are two noteworthy characteristics of the proceedings below. First, the primary theory of liability upon which the plaintiff relies in his appeal to this Court was waived at every level in the state court proceedings. The court of appeals recognized "respondeat superior as it has been applied under the Federal Employers' Liability Act" as the "only assignment of error presented to us for review." Statement of Jurisdiction, Appendix at A-2. The plaintiff's sole Proposition of Law presented to the Ohio Supreme Court, a recast version of the sole assignment of error in the court of appeals, consisted in its entirety of the following:

> Recovery may be had, under FELA law for personal injuries inflicted upon an employee by that employer's foreman, if that foreman is, at the time of the infliction

> of such injuries, acting within the scope of his employment, and in furtherance of his employer's business.

Plaintiff now devotes only one sentence in his entire Statement of Jurisdiction to respondeat superior and scope of employment. Statement of Jurisdiction at 9. The remainder of the argument is the "negligent hire" theory which, for reasons which will become obvious, was never raised in the courts below. This is the first time negligence has been argued as the basis for liability in this action.

The second noteworthy characteristic of the state court proceedings is the absence of *any* mention of a state/federal question. No "standard of review" issue was developed in any of the plaintiff's state court briefs or memoranda. Indeed, it appears that all parties agreed on the standard of review, which is the same for summary judgment under the applicable state rules as under the federal rules.

### C. The Incident Between Tarvin and Ferneding.

At the time of the incident, Tarvin was employed by Conrail as Ferneding's supervisor. Shortly prior to the incident, Ferneding had recorded in his personal log book an accusation that Tarvin had wrecked a truck while it was in Ferneding's possession. (Ferneding now admits that the statement was completely without basis.) The personal log book was subject to random inspection by railroad supervisors. Tarvin learned of the false accusation, and was understandably upset.

Tarvin's anger apparently intensified. On the night of the incident he clocked out and went home at approximately 4:00 p.m.* While at home, he drank a twelve pack of beer.

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* Although, as a supervisor, Tarvin was technically "on call" 24 hours a day, he had not been called to the yard on the night of the incident, but went there of his own accord. His normal shift ended at 4:00 p.m.

At around 8:45 p.m. Tarvin went back to the Conrail yard, in a condition which he described in his deposition as "drunk with a gun," and confronted Ferneding at a small building known as the signal shop. According to Ferneding, Tarvin first pulled the gun out when Ferneding expressed an intention to leave the signal shop and attend to his normal duties. Tarvin menaced Ferneding for approximately three and a half hours, holding him at gunpoint and forcing him to write a retraction of the false statement written in his personal log. The incident ended when Tarvin, having procured the written retraction, went home. He never fired the gun, never physically harmed the plaintiff.

Once the railroad learned of the incident, Tarvin was suspended and placed in an alcohol rehabilitation program. There is no evidence that Tarvin had ever before been involved in any violent, menacing, or drunken incident, nor is there any evidence that Conrail had reason to suspect he might erupt in such a fashion. Ferneding testified that, prior to the drunken episode at the signal shop, he and Tarvin had gotten along "fine," he had never heard of Tarvin doing anything dangerous or violent, and the incident in question came as a complete surprise.

There is no evidence that Tarvin had ever before appeared drunk while on Conrail property, or that his confrontation with Ferneding was motivated by anything other than his personal animosity toward the plaintiff. Tarvin testified that he brought a gun with him "[m]ainly because I knew that [Ferneding] carried one." Tarvin repeatedly acknowledged in his deposition that he returned to the railyard because he "was upset that [Ferneding] had put that in the log," that the substance of the conversation that night was "mainly over why he had put in his log book that I wrecked that truck," and that he was principally concerned with clearing his own good name.

The appellant's Statement of Jurisdiction seriously distorts the evidence in this case. No one told Tarvin to check on

Ferneding on the particular night of the incident, although he had general orders, as supervisor, to be responsible for Ferneding's work. Tarvin and Ferneding both testified that Conrail's rules prohibited the possession of guns or the consumption of alcohol on railroad property. The railroad's suspension of Tarvin after the incident is evidence that it did not acquiesce in such conduct. Finally, there is no evidence whatsoever that Tarvin's supervisor, Al Hendershott, played any role in this incident. He was not present at the signal shop, nor had he told Tarvin to go there that evening. Tarvin's own words reveals the personal nature of his drunken visit to the signal shop—a visit intended to clear his name, and confront the man who had falsely accused him. The Appellant's Statement of the Case no more reflects reality that did the accusation against Tarvin contained in the Appellant's log book.

## I. THE APPEAL SHOULD BE DISMISSED AS FAILING TO CONFER APPELLATE JURISDICTION UNDER 28 U.S.C. § 1257(2)

### A. This Case Does Not Fall Within the Standards for a § 1257(2) Appeal.

Plaintiff advances this appeal under 28 U.S.C. § 1257(2), which confers jurisdiction only over state decisions upholding the validity of a state statute allegedly in conflict with the Constitution or laws of the United States. Plainly no state statute is involved. The only statute at issue is the Federal Employers' Liability Act, which was dutifully applied in accordance with the rules of this and other federal courts. Portions of Federal and Ohio Rule of Civil Procedure 56 are set forth in the appellant's jurisdictional memorandum, but nowhere discussed therein. Nothing in Ohio Civil Rule 56 conflicts with any federal statute; indeed, the Ohio summary judgment rule is modeled on the federal rule. *See* Staff Note to Ohio R. Civ. P. 56. The plaintiff has manifestly

neglected to provide any support for the claimed appellate jurisdiction of this Court. This matter would be reviewable, if at all, only under petition for a writ of certiorari.

### B. No Federal Question Has Been Timely or Properly Raised Nor Passed Upon by the Courts Below.

At every level below, the sole issue—as framed by both parties—was whether there were disputed questions of material fact sufficient that reasonable minds could come to any conclusion but that Tarvin had acted outside the scope of his employment. At no point did the plaintiff complain that the courts were erroneously applying state standards of review in lieu of federal standards. The claimed error was that the trial court failed to correctly apply the law to the facts, not that it failed to invoke the correct law. As the plaintiff has never raised a question of conflict between state and federal law, there has been no state decision which could confer § 1257(2) jurisdiction.

### C. This Case Presents No Substantial Federal Question.

The Ohio Court of Appeals relied upon the leading intentional tort case decided under FELA law. *Davis* v. *Green*, 260 U.S. 349, 43 S. Ct. 123 (1922). The principles set forth in *Davis* are those traditionally found in respondeat superior actions, where scope of employment is the pivotal question. There is no reason for this Court to again travel that well-marked path.

## II. THE DECISIONS OF THE OHIO STATE COURTS SHOULD BE AFFIRMED

In the alternative, Conrail moves the Court to affirm the decisions below, which are well-supported under FELA law. *Davis* v. *Green* requires that an employee be acting in furtherance of the employer's business before his tortious conduct may be imputed to the employer. It is thus established

that "where . . . an employee of a railroad company is injured by an unprovoked assault of a fellow servant . . . the employer is not liable unless the aggressor was at the time of the assault acting within the scope of his employment." *Sheaf* v. *Minneapolis, St. P. & S.S.M. R. Co.*, 162 F.2d 110, 113 (8th Cir. 1947). *See Ochsrider* v. *Reading Co.*, 172 F. Supp. 830 (E.D.Pa. 1959). A summary judgment or directed verdict is appropriate where the evidence is that the assailant was motivated by revenge or to further his personal interests. *Brooks* v. *Washington Terminal Co.*, 593 F.2d 1285 (D.C. Cir.), *cert. denied*, 442 U.S. 910, 99 S. Ct. 2823 (1979); *Euresti* v. *Washington Terminal Co.*, 280 F.2d 629 (D.C. Cir. 1960).

The undisputed facts in the case at hand establish the entirely personal nature of Tarvin's threats to the plaintiff. Certainly the railroad gained nothing from Tarvin's assault on Ferneding, which actually prevented the plaintiff from performing his duties. Tarvin's testimony leaves no doubt that he was on a personal frolic, motivated entirely by self-interest in securing a retraction of Ferneding's earlier misstatement. The assault was, moreover, a product of intoxication which occurred outside the control and contrary to the wishes of the railroad. Conrail is not liable under the Federal Employers Liability Act, or on any other theory, for this intentional offensive behavior.

As to the "negligent hire" theory, raised for the first time in this Court, the facts even as recited by plaintiff fail to support the claim that Tarvin was an obviously dangerous man. Even Ferneding admitted that Tarvin exhibited no prior indication that he would behave violently. As the plaintiff testified, "Well, everybody got along with him, you know. He was a good boss." Ferneding had never heard of Tarvin fighting or threatening anyone. Tarvin's threats to Ferneding were, by all accounts, unprecedented. The record contains no facts sufficient to raise an issue as to the railroad's negligence in hiring or retaining Tarvin.

Moreover, it is too late for the plaintiff to raise this argument. It was repeatedly and expressly waived below, never addressed in argument, nor passed upon by the Ohio courts.

## CONCLUSION

For the foregoing reasons, Appellee Consolidated Rail Corporation respectfully requests the Court to dismiss the within appeal, or in the alternative to affirm the decisions of the Ohio Supreme Court and Ohio Court of Appeals.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August 1984, three copies of this Motion to Dismiss or Affirm were served upon Harvey B. Woods, Esq., and Sharon A. Sullivan, Esq., 1212 Second National Building, 832 Main Street, Cincinnati, Ohio 45202, Counsel for Appellant. I further certify that all parties required to be served have been served.

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Gary D. Bullock